

(c) *Effective/applicability dates.* An authorization under paragraph (a) in effect prior to December 12, 2013 continues to be in effect after that date. Paragraph (b) of this section applies to wages paid on or after January 1, 2014. However, pursuant to section 7805(b), taxpayers may rely on paragraph (b) of this section for all taxable years for which a valid designation is in effect under paragraph (a) of this section.

[T.D. 9649, 78 FR 75474, Dec. 12, 2013]

§ 31.3504-2 Designation of payor to perform acts of an employer.

(a) *In general.* A person (as defined in section 7701(a)(1)) that pays wages or compensation (“payor”) to the individual(s) performing services for any client pursuant to a service agreement, except as provided in paragraph (d) of this section, is designated to perform the acts required of an employer with respect to the wages or compensation paid. For purposes of this section the term *wages* has the same meaning as the term *wages* has for purposes of chapters 21, 23, and 24, and the term *compensation* has the same meaning as the term *compensation* has for purposes of chapter 22. This section is not applicable if the payor has been authorized as an agent of the employer under § 31.3504-1.

(b) *Definitions*—(1) *Client.* The term *client* means an individual or entity that enters into a service agreement with the payor.

(2) *Service agreement.* (i) The term *service agreement* means an agreement pursuant to which the payor—

(A) Asserts it is the employer (or “co-employer”) of the individual(s) performing services for the client;

(B) Pays wages or compensation to the individual(s) for services the individual(s) perform for the client; and

(C) Assumes responsibility to collect, report, and pay, or assumes liability for, any taxes applicable under subtitle C of the Code with respect to the wages or compensation paid by the payor to the individual(s) performing services for the client.

(ii) For purposes of paragraph (b)(2)(i)(A) of this section, the payor may implicitly or explicitly assert it is the employer (or “co-employer”) of the

individual(s) performing services for the client, including by agreeing to—

(A) Recruit and hire employees for the client or assign employees as permanent or temporary members of the client’s work force, or participate with the client in these actions;

(B) Hire the client’s employees as its own and then provide them back to the client to perform services for the client; or

(C) File employment tax returns using its own employer identification number that include wages or compensation paid to the individual(s) performing services for the client.

(c) *Effects of designation.* If a payor is designated to perform the acts required of an employer under this section then the following rules apply—

(1) A payor must perform the acts required of an employer under each applicable chapter of the Code and the relevant regulations with respect to the wages or compensation paid by such payor. All provisions of law (including penalties) and the regulations applicable to the employer are applicable to the payor so designated with respect to the wages or compensation paid by the payor; and

(2) Each employer for whom the payor is designated remains subject to all provisions of law (including penalties) and of the regulations applicable to an employer.

(d) *Exceptions.* A payor is not designated to perform the acts required of an employer under this section for any wages or compensation paid by the payor to the individual(s) performing services for a client if—

(1) The wages or compensation are reported on a return filed under the client’s employer identification number (as defined in section 6109 and the applicable regulations);

(2) The payor is a common paymaster under sections 3121(s) or 3231(i);

(3) The payor is the employer of the individual(s) (including an employer within the meaning of section 3401(d)(1)); or

(4) The payor is treated as an employer under section 3121(a)(2)(A).

(e) *Examples.* The following examples illustrate the application of this section:

(1) *Example 1.* Corporation P enters into an agreement with Employer, effective January 1, 2015. Under the agreement, Corporation P hires the Employer's employees as its own employees and provides them back to Employer to perform services for Employer. Corporation P also assumes responsibility to make payment of the individuals' wages and for the collection, reporting, and payment of applicable taxes. For all pay periods in 2015, Employer provides Corporation P with an amount equal to the gross payroll (that is, wage and tax amounts) of the individuals, and Corporation P pays wages (less the applicable withholding) to the individuals performing services for Employer. Corporation P also reports the wage and tax amounts on Form 941, *Employer's QUARTERLY Federal Tax Return*, filed for each quarter of 2015 under Corporation P's employer identification number. Corporation P is not a common paymaster, the employer of the individuals (including an employer within the meaning of section 3401(d)(1)), or treated as the employer of the individual under section 3121(a)(2)(A). Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(2) *Example 2.* Same facts as *Example 1*, except that Corporation P only reports the wage and tax amounts on Form 941, *Employer's QUARTERLY Federal Tax Return*, filed for the 1st and 2nd quarters of 2015. Neither Corporation P nor Employer files returns for the 3rd and 4th quarters of 2015. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(3) *Example 3.* Same facts as *Example 1*, except that neither Corporation P nor Employer reports the wage and tax amounts on Form 941, *Employer's QUARTERLY Federal Tax Return*, for any quarter of 2015. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(4) *Example 4.* Same facts as *Example 1*, except that Employer provides only net payroll (that is, wages less tax amounts) to Corpora-

tion P for each pay period. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(5) *Example 5.* Same facts as *Example 1*, except that after Corporation P reports the wage and tax amounts on Form 941, *Employer's QUARTERLY Federal Tax Return*, filed for each quarter of 2015 under Corporation P's employer identification number, Corporation P files a claim for refund of the employment taxes it paid for each quarter of 2015 that are related to wages Corporation P paid to the individuals performing services for Employer. The basis for Corporation P's refund claim is that Corporation P is not the employer of the individuals that performed services for Employer. Corporation P is designated to perform the acts of an employer with respect to all of the wages Corporation P paid to the individuals performing services for Employer for all quarters of 2015. Accordingly, Corporation P is not entitled to a refund. Employer and Corporation P are each subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(6) *Example 6.* Corporation S enters into an agreement with Employer, effective January 1, 2015. Under the agreement, Corporation S provides payroll services, including payment of wages to individuals performing services for Employer, and assumes responsibility for the collection, reporting, and payment of applicable taxes. For all pay periods in 2015, Employer provides Corporation S with an amount equal to the gross payroll (that is, wage and tax amounts) of the individuals, and Corporation S pays wages (less the applicable withholding) to the individuals performing services for Employer. Corporation S also reports the wage and tax amounts on Form 941, *Employer's QUARTERLY Federal Tax Return*, filed for each quarter of 2015 under Employer's employer identification number. Corporation S is not designated to perform the acts of an employer with respect to all of the wages Corporation S paid to the individuals performing services for Employer for all quarters of 2015. Corporation S did not assert it was the employer and filed Forms 941 using Employer's employer identification number. Accordingly, Corporation S is not liable for the applicable employment taxes under this section. Employer remains subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(7) *Example 7.* Corporation T enters into a consulting agreement with Manufacturer effective January 1, 2015, to provide consulting services to Manufacturer. Corporation T is responsible to pay wages to the individuals providing the consulting services to Manufacturer and to collect, report, and pay the applicable taxes. Corporation T has the right to direct and control the individuals as to when and how to perform the consulting services and, thus, is the common law employer of the individuals providing the consulting services. Corporation T is not designated to perform the acts of an employer with respect to all of the wages Corporation T pays to individuals providing consulting services to Manufacturer. However, as the common law employer of the individuals, Corporation T is subject to all provisions of law (including penalties) applicable in respect of employers with respect to such wages.

(8) *Example 8.* On January 1, 2015, Corporation U enters into an agreement with Employer for Employer to farm Corporation U's property. Under the agreement, Corporation U and Employer agree to split the proceeds of the sale of the products grown on the property. Employer hires workers to assist it with the farming. Employer has the right to direct and control the workers as to when and how to perform the services and, thus, is the common law employer of the workers. However, Employer is unable to pay the workers until after the products are sold. Therefore, Corporation U pays wages to the workers and deducts this amount from Employer's share of the profits. Corporation U controls the payment of wages within the meaning of section 3401(d)(1). Corporation U is not designated to perform the acts of an employer with respect to all of the wages Corporation U paid to workers providing services for Employer. However, as the section 3401(d)(1) employer of the workers performing services for Employer, Corporation U is subject to all provisions of law (including penalties) applicable in respect of employers with respect to such wages.

(9) *Example 9.* Corporation V and Employer execute and submit a Form 2678, *Employer/Payer Appointment of Agent*, to the Service, requesting approval to authorize Corporation U to report, deposit, and pay taxes with respect to wages it pays, as agent of Employer for purposes of Form 941, *Employer's QUARTERLY Federal Tax Return*. The Form 2678 is approved by the Service and effective for all quarters of 2015. Accordingly, Corporation V reports the wages it pays to individuals performing services for Employer and related tax amounts on Form 941 and Schedule R (Form 941), *Allocation Schedule for Aggregate Form 941 Filers*, filed for each quarter of 2015 under Corporation V's employer identification number. Corporation V is not designated under this section to perform the

acts of an employer with respect to all of the wages Corporation V paid to the individuals performing services for Employer for all quarters of 2015. However, as an agent authorized under § 31.3504-1(a), Corporation V is subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages. Employer also remains subject to all provisions of law (including penalties) applicable in respect of employers for all quarters of 2015 with respect to such wages.

(f) *Effective/applicability date.* These final regulations are effective for wages or compensation paid by a payor in quarters beginning on or after March 31, 2014.

[T.D. 9662, 79 FR 17862, Mar. 31, 2014]

§ 31.3505-1 Liability of third parties paying or providing for wages.

(a) *Personal liability in case of direct payment of wages—(1) In general.* A lender, surety, or other person—

(i) Who is not an employer for purposes of section 3102 (relating to deduction of tax from wages under the Federal Insurance Contributions Act), section 3202 (relating to deduction of tax from compensation under the Railroad Retirement Tax Act), or section 3402 (relating to deduction of income tax from wages) with respect to an employee or group of employees, and

(ii) Who pays wages on or after January 1, 1967, directly to such employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes required to be deducted and withheld from those wages by the employer under subtitle C of the Code and interest from the due date of the employer's return relating to such taxes for the period in which the wages are paid.

(2) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. Pursuant to a wage claim of \$200, A, a surety company, paid a net amount of \$158 to B, an employee of the X Construction Company. This was done in accordance with A's payment bond covering a private construction job on which B was an employee. If X Construction Company fails to make timely payment or deposit of \$42.00, the amount